Originally published in

New York Law Journal

Government and Election Law

December 29, 2017

2018: A Big Year for Voting Rights Restoration?

Government and Election Law columnists Jerry H. Goldfeder and Myrna Pérez write: In an era when the federal government appears intent on further restrictions, it behooves the states to expand voting rights. The few hopeful signs as outlined below allow a positive outlook for the new year.

By Jerry H. Goldfeder and Myrna Pérez

Alabama's election of Doug Jones to the U.S. Senate made some waves. From our perspective, the former U.S. Attorney immediately became a symbol for those working toward eliminating some of the worst voting restrictions in the country. Unlike Roy Moore, who criticized lawful efforts to register eligible persons with past criminal convictions, Jones has advocated for easing restrictions on the voting rights of those who have served their time.

Thirty-four states continue to disenfranchise many of these citizens. Twenty states do not restore voting rights to citizens in the community unless they complete all terms of their sentence (for example, they must complete probation and parole), and four more (like New York) disenfranchise parolees but not probationers. Seven states disenfranchise some people for life based on severity of crime (unless specifically restored by the government), and Florida, Kentucky, and Iowa disenfranchise for life all those convicted of a felony, unless they are

individually approved for restoration by the government. (Virginia is technically a fourth state with lifetime disenfranchisement pursuant to its Constitution, but Gov. Terry McAuliffe exercised his discretion to individually restore rights to over 150,000 Virginians, effectively shifting to a policy of restoring rights to those in the community. His one-by-one signings became necessary after his attempt at a more sweeping executive action resulted in pushback from the courts.) These laws result in about 4.7 million Americans living in their communities and unable to participate fully in civic life.

But there is cause for optimism in 2018. Back to Senator-elect Jones. In 2007, he filed an amicus brief in the Alabama Supreme Court on behalf of religious leaders in *Chapman v. Gooden*. The case challenged the Alabama Secretary of State's practice of denying voter registration to all citizens with felony convictions, despite state law being limited to crimes of "moral turpitude," a vague term that has been problematic for decades. After the trial court in *Gooden* directed the state to develop a workable definition, they amended their practice in order to avoid further litigation, but it took 10 years, until this past May, for the "Definition of Moral Turpitude Act" to finally define the term and eliminate the discretion that local elected officials used to disenfranchise so many voters. By clarifying whose rights are restored, this Act takes an important step forward in Alabama.

Alabama is not the only state which has seen progress in this area. In fact, for the last few decades, the country has been slowly but surely moving in the direction of restoration of voting rights for Americans with convictions in their past. For example, in 1997, then-Gov. George Bush signed a law restoring voting rights to Texans upon completion of a criminal sentence, including parole and probation—Texas had previously had a stricter rule than that. More recently, Rhode Island, via referendum, restored voting rights to people who live in the community. Maryland adopted the same policy legislatively (and overrode a gubernatorial veto to do so).

State-level changes are welcome because federal forums are not likely to be hospitable to rights restoration efforts. In 1974, the U.S. Supreme Court held in *Richardson v. Ramirez* that state felon disenfranchisement laws do not violate the 14th Amendment. However, the court did place some outer limits on these laws a decade later in *Hunter v. Underwood*, which unanimously found that Alabama's definition of "moral turpitude," though facially neutral, was motivated by a racially discriminatory purpose. That said, because of general disparities in the criminal justice system, the burdens of these voting laws generally fall disproportionately on people and communities of color, but clear indicia of discriminatory intent are not always available. Challenges under the "results test" of §2 of the Voting Rights Act have not been successful. The Ninth Circuit, after at one point striking down the law, upheld Washington's felon disenfranchisement law in *Farrakhan v. Gregoire*, in the face of a challenge that

discriminatory "results" were derivative of discrimination elsewhere in the criminal justice system, and the Sixth Circuit entertained a similar claim in *Wesley v. Collins*, also ultimately finding no violation. The Second and Eleventh Circuits found as a matter of statutory interpretation that the Act does not apply to these provisions. (Justice Sonia Sotomayor, then a Second Circuit Judge, dissented in *Hayden v. Pataki*, arguing that "Section 2 of the Act by its unambiguous terms subjects felony disenfranchisement and all other voting qualifications to its coverage.")

Federal legislative efforts are ongoing, but unclear as to when movement will occur. The Democracy Restoration Act has been introduced in every Congress since 2008. The Act would restore voting rights in *federal* elections to all Americans with a past conviction who are living in the community, including those released from prison and probationers who are never incarcerated, affecting about 4.7 million people. Senator-elect Doug Jones has publicly stated his support for this Act.

So we need to keep our eye on state reform. After the 2017 elections gave Democrats unified control of the state executive and legislature, New Jersey is a state to watch for new legislation to move from post-sentence to post-incarceration restoration. Gov.-elect Phil Murphy, in particular, has come out strongly in favor of expanding access to voting rights for persons with criminal convictions.

No state, however, better exemplifies these challenges or presents a more consequential opportunity than Florida, in which nearly 1.5 million people who have completed their sentence (including probation and parole) are disenfranchised—about 10 percent of the voting-age population. After former Gov. Charlie Crist's tiered system of limited rights restoration cut into the astronomical population of disenfranchised to the tune of over 150,000 restorations, his successor Rick Scott returned the state to an ad hoc clemency system in which an executive board sits just a few times a year, granting restoration to fewer than 600 individuals annually. The most efficacious avenue for reform in Florida, then, is a constitutional amendment, so a grassroots campaign set out this year to gather the more than 760,000 verified signatures needed to place a constitutional amendment on the ballot. As of publication, they are more than two-thirds of the way to their goal, and more signatures are verified every day. Given that similar proposals are pending with the Florida Constitution Revision Commission, it seems possible the state will have the opportunity to vote on this in 2018. If 60 percent of voters approve it, nearly all of the 1.5 million people who have completed their sentence will regain the right to participate in our democracy.

Florida is not alone in this back and forth policy on voting rights. In both Iowa and Kentucky, Democratic governors enacted reforms, moving their states from lifetime disenfranchisement

for all to a less restrictive policy, only to have those orders revoked by successors. On the other hand, Gov.-elect Ralph Northam of Virginia is expected to continue McAuliffe's policy.

In an era when the federal government appears intent on further restrictions, it behooves the states to expand voting rights. The few hopeful signs as outlined above allow a positive outlook for the new year.

Jerry H. Goldfeder, special counsel at Stroock & Stroock & Lavan LLP, teaches election law at Fordham Law School and University of Pennsylvania Law School. Myrna Pérez is the director of the Voting Rights and Elections Project at the Brennan Center for Justice at NYU School of Law.